89-1200

SUPREME COURT, U.S.
FILED
JAN 19 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
DECEMBER TERM, 1989

PAUL DOHR, SR., Personal
Representative of the Estate of
ELAINE A. DOHR, Deceased,
PETITIONER,

vs.

GERALD R. PROVENCAL and
MEHMET F. ERDEM, M.D.,
jointly and severally,
RESPONDENTS

**PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MICHIGAN**

**PETITION FOR WRIT OF CERTIORARI**

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## QUESTION PRESENTED

Does a state violate The Due Process provisions of The Fourteenth Amendment by arbitrarily granting immunity to a state public health institution that failed to train its workers and thereby failed to provide a safe workplace, which failure resulted in the death of a worker (who contracted hepititis), where:

(1) The state Court of Appeals determined that even though Defendant owed the requisite duty, Defendant

should nevertheless be granted immunity; and

(2) The state's OWN STATUTES specifically impose liability upon such governmental entities WITHOUT granting immunity.

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

Petitioner, Paul Dohr, Sr., personal representative of the estate of Elaine Dohr, deceased, by and through his attorneys, Coleman, Lipson and Bradford, Professional Corporation, respectfully prays that a Writ of Certiorari issue to review the Order of the Michigan Supreme Court, entered in the above-entitled cause on September 26, 1989.

I.

## OPINIONS BELOW

The Order of the Michigan Supreme Court is attached as Appendix A. The Opinion of the Michigan Court of Appeals is attached as Appendix B. The Order of the Oakland County Circuit Court is attached as Appendix C.

## II.

## JURISDICTION

The Order of the Michigan Supreme Court was filed September 26, 1989. The jurisdiction of this Court is invoked pursuant to The Fourteenth Amendment To The U.S. Constitution, in 28 U.S.C.A. Section 2101.

## III.

## CONSTITUTIONAL PROVISION INVOLVED

The Due Process and Equal Protection provisions of The Fourteenth Amendment To The United States Constitution.

## IV.

## STATEMENT OF FACTS

### PROCEDURAL HISTORY

This case involves the dismissal of a wrongful death lawsuit -filed by

the Petitioner - soley due to an alleged claim of governmental immunity, despite a finding of a "duty owed" to Petitioner's decedent.

The Petitioner filed suit in the Oakland County Circuit Court of Michigan. Defendants Provencal and Erdem filed motions for summary disposition, but only Defendant Provencal's motion was granted, on January 29, 1987. Defendant Erdem's motion for summary disposition was denied. On appeal by leave granted from the Circuit Court, the Michigan

Court of Appeals reversed the Circuit Court's order and granted Defendant Erdem's motion for summary disposition, on March 1, 1989. Petitioner applied for leave to appeal the Court of Appeals ruling to the Michigan Supreme Court. On September 26, 1989, the Michigan Supreme Court issued an order denying the Petitioner leave to appeal. Petitioner appeals to this Honorable Court for a Writ of Certiorari.

FACTUAL HISTORY

Petitioner's decedent, Elaine A. Dohr, worked as a teacher's aide at the Cloverdale Training Center in Farmington Hills, Michigan. The Center served mentally retarded persons, a high number of whom were known carriers of the deadly Hepatitis B virus.

Elaine Dohr contracted the virus in December, 1982, when a student, who was a Hepatitis B carrier, spit in her mouth. She died as a result

of contracting that virus, on May 9, 1983.

From the time Elaine Dohr began work at Cloverdale until the present day, Defendant Gerald Provencal has been the Director of the Macomb-Oakland Regional Center (hereinafter "MORC"), and Defendant Mehmet Erdem, M.D., has been the Medical Director of the MORC. Cloverdale received client-patient referrals from the MORC. Those referrals included Hepatitis B carriers.

Defendants Provencal and Erdem were both aware of the Hepatitis B problem that was developing at Cloverdale. They received a great deal of information from the Michigan Department of Mental Health regarding Hepatitis B and the danger to those persons who worked with Hepatitis B carriers. Yet, the Defendants never warned the Cloverdale staff, including Elaine Dohr, about the danger of Hepatitis B.

V.

## REASONS FOR GRANTING THE WRIT

### STATE CONTRADICTS ITSELF

The State had no business granting immunity in this case. Its own statutes specifically impose the liability, ab initio. In particular The Michigan Occupational Safety and Health Act specifically defines an "employer" as including "the state or a political subdivision," M.C.L.A. 408.1005 (2). The definition states:

> (2) "Employer" means an individual or organization,

including the state or a political subdivision, which employs 1 or more persons. [M.C.L.A. 408.1005 (2)]

That same statute then imposes responsibility as follows:

(1) An employer shall:

(a) Furnish to each employee, employment and a place of employment which is free from recognized hazards that are causing, or are likely to cause, death or serious physical harm to the employee. [M.C.L.A. 408.1011 (1)(a)].

It is clearly irrational for a state to impose liability upon a political subdivision in one breath, only to have it taken away by the Michigan Supreme Court, in the next. The statute imposing the liability says nothing about immunity. And it wouldn't make any sense if it did.

In the case at bar, Defendant Erdem, acting contrary to state law and Departmant of Mental Health guidelines, created the hazardous environment which resulted in the death of Elaine Dohr. Had she been

warned about the presence of the virus and received training on what to do upon contact with the virus, she would not have died from that contact.

The Michigan Court of Appeals, before it cloaked Defendant Erdem with governmental immunity, established the special responsibility which he owed to Elaine Dohr:

> Plaintiff's decedent was a member of a special class of persons who worked with these students and was not a member of the general

public. Her close physical contact with these students made the virus life-threatening as to her, but treatable and preventable if she had been warned of the danger and instructed to obtain a vaccine upon exposure to the virus. Under these facts, we believe that the trial court did not err in finding that defendant owed a duty to plaintiff's decedent. Dohr v. Provencal and Erdem, Michigan Court of Appeals, 1989 (unpublished).

CANTON V. HARRIS

It is clear that Defendant Erdem owed a duty to Elaine Dohr under the

law (as the Michigan Court Of Appeals so found). Additionally, common sense dictated that, as an employer, Defendant Erdem should have warned his employees that they were working in a hazardous environment. The employees' need for training was so obvious that to ignore the need amounted to deliberate indifference to the rights of the employees, including Elaine Dohr.

In a recent 9-0 ruling, this Court stated that a lack of training by a governmental unit, due to

deliberate indifference, which results in an injury closely related to that lack of training, is actionable. Ergo, there would be no cloak of immunity. Canton v. Harris, 109 S.Ct. 1197 (1989). In his opinion, Justice White stated in part:

> It may seem contrary to common sense to assert that a municipality will actually have a policy of not taking reasonable steps to train its employees. But it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and

> the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper traning may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury (footnotes omitted).

SOVEREIGN IMMUNITY IN GENERAL

Petitioner concedes that sovereign immunity is not per se unconstitutional. But the state's

decision to grant such immunity is not absolute. Gibson v. Commonwealth of Pennsylvania, 415 A.2d 80, 490 Pa. 156 (1980).

There must be some limit to irrational use of the concept. In the Gibson case, supra, retroactivity was in issue. In the case at bar, we are dealing with outright unjustified, unexplained inconsistency.

VI.

## CONCLUSION

The Michigan courts incorrectly applied the doctrine of governmental immunity. By the Canton, supra, standard, the Petitioner's decedent is entitled to have his case tried on its merits.

COLEMAN, LIPSON AND BRADFORD
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Dated: 12/14/89

MICHIGAN SUPREME COURT

ORDER
Entered: September 26, 1989

PAUL DOHR, SR., Personal Representative of the ESTATE OF ELAINE A. DOHR, Deceased,

Plaintiff-Appellant,

v.

GERALD R. PROVENCAL,
Defendant,

SC: 85701
COA: 98583
LC: 84-287946-NM

and

MEHMET F. ERDEM, M.D.,

Defendant-Appellee.

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On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

**APPENDIX "A"**

STATE OF MICHIGAN
COURT OF APPEALS

PAUL DOHR, SR., Personal Representative of the ESTATE OF ELAINE A. DOHR, Deceased,

Plaintiff-Appellant,

v.

GERALD R. PROVENCAL, No. 98583

Defendant,

and

MEHMET F. ERDEM, M.D.,

Defendant-Appellee.

Before: Hood, P.J., and Beasley and T.M. Burns, JJ. PER CURIAM.

Defendant, Dr. Mehmet F. ERdem, appeals by leave granted from an order denying his motion for summary disposition in this negligence and

Appendix B

medical malpractice case.

Plaintiff's decedent, Elaine A. Dohr, was a teacher's aide in the Farmington Hills School District in a program providing special education services to mentally retarded persons. Plaintiff claims that Elaine Dohr contracted hepatitis B from a student, who was a carrier of the hepatitis B virus, when the student spit in her mouth, and subsequently she died at the age of 53.

Plaintiff claimed that

defendant, Provencal, who was the director of the Macomb/Oakland Regional Center, and Erdem, who was the medical director of the Macomb/Oakland Regional Center, breached their duties and were negligent in failing to warn employees of the Cloverdale Training Center, such as plaintiff's decedent, that some students were hepatitis B carriers, and in failing to advise these employees of the necessary precautions to be taken in dealing with these individuals.

Defendants moved for summary disposition on three grounds: (1) that defendants are state officials sued in their official capacity and not for any personal acts or omissions with regard to plaintiff's decedent and, therefore, exclusive jurisdiction over plaintiff's claims was in the court of claims; (2) that defendants owed no duty to Elaine Dohr; and (3) that defendant were immune from liability because their actions were discretionary. The trial judge granted the motion for

summary disposition with respect to defendant Provencal, but denied the motion with respect to defendant Erdem. The latter now appeals by leave granted.

First, defendant Erdem moved for summary disposition under MCR 2.116(C)(4), claiming that the circuit court lacked jurisdiction because the claim was a tort action against state officials acting in their official capacity and that, therefore, exclusive jurisdiction was as in the court of claims.

MCL 500.6419(1)(a); MSA 27A.6419(1)(a) vests the Michigan Court of Claims with exclusive jurisdiction of actions for damages against the state. Defendant argues that he is a public official and, thus, the suit must be brought in the court of claims. He says that as medical director of the Macomb/Oakland Regional Center, his job involved an enormous amount of independence and discretion, and since the facility director Provencal was not a physician, defendant

Erdem's decisions regarding medical matters were paramount.

In People v Freedland,[1] the Supreme Court set forth controlling factors that distinguish a public official from a governmental employee. Our consideration of these factors leads us to conclude that defendant Erdem was a state employee and not a government official. Since defendant Erdem was not a state official, the trial court did not err in deciding that the court of claims did not have exclusive jurisdiction.

In addition, defendant argued that pursuant to MCR 2.116(C)(8), plaintiff did not state a claim upon which relief could be granted because defendant Erdem did not owe any duty to plaintiff's decedent which could form the basis of an action in negligence or malpractice. Defendant Erdem argues that there were not facts alleged from which it could be inferred that there was a special relationship between defendant Erdem and plaintiff's decedent, or with the mentally retarded individuals who

allegedly transmitted hepatitis B to plaintiff;'s decedent. We do not agree.

Plaintiff's decedent was a member of a special class of person who worked with these students and was not a member of the general public. Her close physical contact with these students made the virus life-threatening as to her, but treatable and preventable if she had been warned of the danger and instructed to obtain a vaccine upon exposure to the virus. Under these

facts, we believe that the trial court did not err in finding that defendant owed a duty to plaintiff's decedent.

In the motion for summary disposition under MCR 2.166(C)(7), defendant claimed he was immune from tort liability, since he was a governmental employee engaged in discretionary activity. Plaintiff had alleged that defendant participated in developing standards by which to warn, inform and otherwise protect persons, such as

plaintiff's decedent, concerning the transmission of hepatitis B and argued that defendant failed to conform to these standards.

Defendant argues that plaintiff has not alleged any facts which would indicate that the standards which were developed required that defendant personally perform any activity or that defendant, in fact, personally perform any activity related to warning or training plaintiff's decedent. Other employees presumably did the actual

placing of the carriers in the group homes and did the instructions regarding safety. Defendant argues that his acts and omissions were clearly discretionary and, therefore, he is immune from liability.

In Ross v Consumers Power Co. (On Rehearing),[2] the Supreme Court said that lower-level governmental officials, employees and agents are immune from tort liability when they are: (1) acting during the course of their employment and acting, or reasonably believe they are acting,

within the scope of their authority; (2) acting in good faith; and (3) performing discretionary, as opposed to ministerial, acts. Thus, the issue in this case is whether the allegedly negligent activity on the part of defendant was ministerial in nature rather than discretionary.[3]

In Canon v Thumodo,[4] the Supreme Court rejected a definition of "ministerial" previously advanced in Davis v Lihm (On Remand),[5] in which we found that any act of a professional which deviates from

professional standards is, ipso facto, ministerial in nature. The Canon court stated that to adopt such a definition for ministerial acts would come close to eliminating all immunity for professionals by confusing the issues of immunity and negligence. If every act which deviates from the professional norm were to be categorized as "ministerial", immunity would seldom shield professional discretion.

In the within case, while defendant participated in the

development of standards to warn, inform and otherwise protect persons concerning transmission of hepatitis B, there is not any indication that defendant was required personally to perform any activity relating to warning or training of decedent. Any acts or omissions, if any, of defendant Erdem was discretionary and, as such, governmental immunity applies. For this reason, we believe that the order of the trial court denying the motion of defendant Erdem for summary disposition was in error

and should be reversed.

Reversed.

/s/ Harold Hood
/s/ William R. Beasley
/s/ Thomas M. Burns

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF OAKLAND

PAUL DOHR, SR., Personal
Representative of the ESTATE
OF ELAINE A. DOHR, Deceased,

Plaintiff-Appellant,

v.
GERALD R. PROVENCAL,

Defendant, No. 84-287946-NM

and

MEHMET F. ERDEM, M.D.,

Defendant-Appellee.

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STATE OF MICHIGAN
IN THE COURT OF CLAIMS

PAUL DOHR, SR., Personal
Representative of the ESTATE
OF ELAINE A. DOHR, Deceased,

Appendix C

Plaintiff,

v.

THE STATE OF MICHIGAN,

Defendant.

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ORDER PARTIALLY GRANTING AND
PARTIALLY DENYING MOTION
FOR SUMMARY DISPOSITION

At a session of said Court
held in the City of
Pontiac, Michigan, on the
26th day of January, 1987.

Present: Robert Templin
Circuit Judge

Defendants Provencal, Erdem and State of Michigan having moved this Court for summary disposition, the parties having filed briefs and

presented oral argument and the Court being fully advised in the premises,

IT IS ORDERED that summary disposition be and hereby is granted in favor of defendant State of Michigan.

IT IS ORDERED that summary disposition be and hereby is granted in favor of defendant Provencal.

IT IS ORDERED that summary disposition be and hereby is denied

as to defendant Mehmet Erdem, M.D.

/s/ Robert L. Templin